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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )  
 )  
Section 257 Proceeding to )  
Identify and Eliminate )  
Market Entry Barriers )  
for Small Businesses )

GN Docket No. 96-113

COMMENTS

of the

NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

August 23, 1996

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## SUMMARY

The National Telephone Cooperative Association submits these comments in the proceeding examining market entry barriers for small communications businesses. The Commission proposes to use the information gathered in this proceeding to both identify market entry barriers and design appropriate measures to eliminate them. NTCA respectfully submits that the Commission already has some measures in place that serve as market entry barriers. Despite the fact the Commission has alleviated some of the regulatory burdens on small telecommunications companies, there still exists some Commission policies and practices that serve to defeat market entry. The Commission should begin the weighty task of eliminating market entry barriers by looking within to withdraw, amend, or replace regulations and /or policies that inhibit small telecommunications companies from becoming noticeable participants in their industry.

NTCA suggests several areas where the Commission can work to change its regulations and policies as part of this proceeding. First, the Commission should enhance the ability of small rural companies to participate in auctions. Available data indicates that rural telephone companies have not had effective opportunities to provide PCS in their service areas under the current bidding rules. Second, the Commission should reconsider its policy of requiring a study area waiver petition by companies that seek to acquire additional telephone exchanges and add them to their respective study areas. The

\$5,350 involved in making the request is burdensome for some small and rural LECs.

Third, the Commission should revise its rule restricting small cost companies from conversion to average schedule status because the rule currently permits only companies participating in average schedule settlements on December 1, 1982 to do so. Fourth, the Commission should adopt an expedited approval process to handle independent telephone company requests to reroute traffic in a way that associates traffic with a different LATA. Finally, the Commission should recognize that its practice of considering all incumbent local exchange carriers "dominant" for RFA purposes continually results in its failure to analyze adverse impacts its rules and proposals impose on small rural LECs. The Commission should use the Small Business Administration's definition of a small telecommunication company until it follows proper procedures for creating its own definitions. This would, of course, require the Commission to complete a final regulatory flexibility check at the initiation of every new proceeding.

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Market Entry Barriers	)	
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COMMENTS  
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NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA") submits the following comments in response to the *Notice of Inquiry* ("*Notice*") released on May 21, 1996, inviting comments on the above-captioned proceeding. Pursuant to Section 257 of the Telecommunications Act of 1996 ("Act"),<sup>1</sup> the Commission has implemented this proceeding to identify and eliminate barriers that impede entry into the telecommunications market by entrepreneurs and other small businesses. The Commission solicits comment on market entry barriers to a variety of telecommunications services, and specifically seeks detailed profile data about small telecommunications businesses regarding personal communications services (PCS) and other wireless services, wired cable, local exchange and long-distance, and several additional services.

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<sup>1</sup> Pub. L. No. 104-104.

NTCA is a national association of approximately 500 local exchange carriers ("LECs"). These LECs provide telecommunications services to end users and interexchange carriers throughout rural America.

**I. AUCTION RESULTS DATA DO NOT INDICATE THAT ALL RURAL COMPANIES HAVE HAD VIABLE OPPORTUNITIES TO PROVIDE PCS IN THEIR SERVICE AREAS UNDER THE CURRENT RULES.**

In the *Notice*, the Commission states that the initiatives in this proceeding will also assist the Commission to disseminate licenses for auctionable spectrum-based services to small businesses, rural telephone companies, and businesses owned by women and minorities as required by Section 309(j).<sup>2</sup> On May 6, 1996, the Commission completed its final round of C-block auctions for PCS licenses, and NTCA has recently compiled information on NTCA member bidding entities.

NTCA is concerned by the poor representation of small and rural telephone company members in the C-block auctions. As emphasized in the *Notice*, the C-block was set aside as an entrepreneur block for broadband PCS, designed as an incentive to enhance small business participation in the competitive bidding process for spectrum-based services. The Commission states that the entrepreneur block restrictions "would have the effect of excluding larger companies that could easily outbid designated entities

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<sup>2</sup> 47 U.S.C. § 309(j).

and thus frustrate Congress' goal of disseminating licenses among a diversity of licensees, while at the same time including firms that are likely to have the financial ability to provide sustained competition to other PCS licensees."<sup>3</sup>

All but a few of NTCA's members meet the Commission's small business definition for PCS. Data showing participation of NTCA members in the C-block auctions is provided in Appendix A.<sup>4</sup> As shown by the data, few NTCA companies were able to compete in the C-block auctions, and only a very small number actually won a license or hold investments in any of the winning consortiums. While 76 of the nearly 500 NTCA members did participate in the C-block auctions, approximately 80 percent of these members were only able to bid as participants in one of the consortium bidding entities. The auction results show that a mere 6 percent of NTCA's total membership are now owners of winning licenses or hold some investment in a winning license, and only 2 NTCA members are sole owners of a broadband PCS license.

Contrary to the Commission's previous expectations,<sup>5</sup> the data do not indicate that all rural telephone companies have had effective opportunities to provide PCS in their

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<sup>3</sup> Notice at para. 15.

<sup>4</sup> Appendix A provides the percentage of NTCA members who participated in the C-block auction by state, their average percentage equity in a bidding entity, and the total number of licenses won by bidding entities partially or wholly owned by NTCA members (by state). Also provided are the member average 1995 annual revenues, number of employees, and number of subscribers by state.

<sup>5</sup> Implementation of Section 309(j) of the Communications Act-Competitive Bidding, PP Docket No. 93-253, *Fifth Report and Order*, 9 FCC Rcd 5599 (1994)(*Competitive Bidding Fifth Report and Order*).

service areas under the current bidding rules. Rather, the auctions results indicate that relatively few NTCA members were able to successfully bid for broadband PCS licenses.<sup>6</sup>

## II. THE STANDARD, LARGE APPLICATION FEES FOR STUDY AREA WAIVERS CAN BE A BARRIER FOR SMALLER COMPANIES.

Historically, the Commission has encouraged the growth of small, rural carriers, finding that they are most familiar with the particular needs of the rural communities. Recently, the Commission issued an order clarifying the circumstances under which incumbent local exchange carriers must obtain a waiver of the definition of study area to reconfigure existing study-area boundaries or create new study areas.<sup>7</sup> Waivers are no longer required when a separately incorporated company establishes a new study area for previously unserved territory, nor are they required for a company that combines previously unserved territory with one of its existing study areas in the same state or for a holding company that consolidates existing study areas in the same state. However, the Commission still requires the filing of study area waiver petitions by those companies

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<sup>6</sup> Similar concerns were expressed in NTCA comments filed in WT Docket No. 96-148. NTCA urged the Commission to permit rural telephone companies the first option to partition PCS licenses in their wireline service area, and also suggested that rural companies be permitted to obtain partitioned licenses outside their service areas under any new rules the Commission adopts for all other entities. See Comments of NTCA filed August 15, 1996 in Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Licensees, WT Docket No. 96-148.

<sup>7</sup> *In re* Request for Clarification Filed by the National Exchange Carrier Association, *Memorandum Opinion and Order*, AAD Docket No. 95-173 (released July 16, 1996).



that seek to acquire additional telephone exchanges and add them to their respective existing study areas.

NTCA believes that the standard application fee for the study area waiver in the amount of \$5,350 is an undue burden for some small and rural LECs. The current rules require the same study area waiver filing fee from large and small LECs alike, including small companies such as Rye Telephone Company and Rock Port Telephone Company.<sup>8</sup> In September, 1995, Rock Port filed for a study area petition that would allow it to add one purchased exchange serving 70 customers to its study area. Rye Telephone also sought a waiver in September, 1995, for a transfer of a mere 19 access lines. These lines were transferred for \$1.00. Clearly, these two examples illustrate that a set \$5,350 fee cannot be justified for all companies seeking study area waivers.

NTCA asks the Commission to consider some alternative. Although the Commission will consider requests for waivers of the filing fee "where good cause is shown, and where waiver would promote the public interest,"<sup>9</sup> Section 1.1116(c) of the Commission's rules require that petitions for fee waivers be filed separately with the Managing Director using the Form 155. This represents an additional hurdle for small

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<sup>8</sup> See, Joint Petition for Waiver of the Definition of "Study Area" in the Appendix - Glossary of Part 36 of the Commission's Rules, Rock Port Telephone Company and Southwestern Bell Telephone Company, AAD 95-92, September 11, 1995. See also, Joint Petition for Waiver of the Definition of "Study Area" in the Appendix - Glossary of Part 36 of the Commission's Rules and Waiver of the Commission's Detailed Information Filing Guidelines for Part 36 Study Area Waiver Requests, US West Communications, Inc. and Rye Telephone Company, Inc., AAD 95-130, September 12, 1995.

<sup>9</sup> 47 C.F.R. § 1.1116(a).

companies seeking to expand service. NTCA urges the Commission to take steps to reduce this burden on small company petitioners, and continue to work toward encouraging the growth of small, rural companies.

**III. THE COMMISSION SHOULD REDUCE THE REGULATORY BURDEN PLACED ON SMALL COMPANIES THAT WISH TO CONVERT TO AVERAGE SCHEDULE SETTLEMENT STATUS.**

The Commission should further encourage the growth of small, rural companies by simplifying and reducing the regulatory burden placed on companies that wish to convert to average schedule status. The Commission's rules currently restrict average schedule settlement methods to those telephone companies that were participating in average schedule settlements on December 1, 1982.<sup>10</sup>

In September, 1993, the National Exchange Carrier Association (NECA) filed a Petition for Rulemaking requesting a revision of the current rule.<sup>11</sup> NTCA urges the Commission to expeditiously initiate this proceeding to revise the rule so as to permit small cost companies to convert to average schedule status. Telephone companies now operate in an industry that has evolved significantly since divestiture. Modification of this rule will remove this restriction and encourage growth of small, rural companies that currently bear an unnecessary regulatory burden.

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<sup>10</sup> 47 C.F.R. § 69.605.

<sup>11</sup> See Petition for Rulemaking, Proposed Revision of Section 69.605 of the Commission's Rules to Allow Small Cost Settlement Companies to Elect Average Schedule Settlement State, September 13, 1993.

IV. THE COMMISSION CAN FACILITATE REMOVAL OF BARRIER ENTRIES BY PROVIDING FOR AN EXPEDITED PROCEDURE TO APPROVE INDEPENDENTS' REQUESTS TO REROUTE TRAFFIC IN A WAY THAT ASSOCIATES THAT TRAFFIC WITH A DIFFERENT LATA.

A matter involving recent requests by small LECs illustrates how Commission procedures can defeat market entry. The procedures involve small LEC needs to associate traffic with different LATAs. The Commission's procedure calls for a notice and comment over a period of 45 days.<sup>12</sup> In the past, a BOC and/or independent followed a waiver procedure to alter its LATA boundaries. It was a procedure employed by a rural telephone company whenever it needed to reconfigure its network to route its traffic to interconnect with BOC offices in LATAs other than the original LATA assigned to it by the MFJ.<sup>13</sup>

NTCA believes there is no need for lengthy procedures prior to Commission approval of reassociation because they do not involve the potential anticompetitive behavior of the type addressed by the old waiver procedure or contemplated by Commission approval authority under Section 271 of the 1996 Act. Small local exchange carriers engaged in transactions that require them to reconfigure their networks and

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<sup>12</sup> Commission Seeks Comment on Petitions for Association Changes by Independent Telephone Companies, *Public Notice*, CC Docket No. 96-158, DA 96-1189 (released July 26, 1996). The petitions stated that Mid-Plains Rural Telephone Cooperative, Inc. and Cap Rock Telephone Cooperative, Inc., respectively, needed to reconfigure their networks in conjunction with acquisitions of exchanges from GTE Southwest in a way that requires a change in LATA association. Both companies requested expeditious action from the Commission.

<sup>13</sup> The rural telco would ask the Department of Justice to recommend to Judge Greene to waive the original LATA boundaries as to the traffic at issue. The waivers were generally approved but the process was often lengthy, usually stretching over several months.

reroute traffic in a way that necessitates LATA reassociation require decisive action from the Commission. Every day the Commission stalls a small company from acting on its business venture presents financial loss to the company and creates a disincentive for the company to engage in future transactions. Therefore, if the Commission insists on a procedure to effectuate LATA association changes by independent companies, it should adopt an expedited procedure.

NTCA suggests that the Commission adopt its recommended expedited procedure to handle these requests in the future. It urges the Office of Communications Business Opportunities to support this recommendation. NTCA's procedure provides any affected carriers a 10 day window in which to submit objections to the pending LATA association change. If no objections are raised, the petition will be deemed approved if no action is taken by the Commission within an additional 10 days. If the petitioner receives objections, it should notify the Commission that the request should be approved regardless or explain any changes to its proposed plan that address the objection.

**V. THE COMMISSION SHOULD ABANDON ITS CONCLUSION THAT ALL INCUMBENT LECS ARE DOMINANT**

While many market entry barriers come from outside the regulatory arena, the Commission's insistence that small incumbent LECs are "dominant" is evidence of that obstacles also come from inside the regulatory arena. The FCC consistently claims small local exchange carriers are not "small entities" because they are "dominant in their field of operation." This is despite the fact that the Small Business Administration (SBA) recognizes a telephone communications company with 1500 employees or fewer as a

small business.<sup>14</sup> The Regulatory Flexibility Act (RFA) requires the Commission to use the SBA definition of a small entity or to consult with the SBA before it devises its own definition of a "small entity."<sup>15</sup> Paragraph 40 of the *Notice* requests comments on how the Commission should define small businesses in this proceeding. The Commission should defer to SBA standards defining a small telecommunications company as one with 1500 or fewer employees for purposes of Section 257.

The Commission most recently ignored the SBA's definition of a small entity or small business and made a size standard determination about small ILECs in its proceeding to implement the interconnection provisions of the Telecommunications Act of 1996 and in another proceeding to change its PCS partitioning rules.<sup>16</sup> In both proceedings, the Commission failed to consider small rural telcos "small entities" even though they have less than 1500 employees. The Commission has already received several comments pointing out this discrepancy.<sup>17</sup> While the Commission addressed the

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<sup>14</sup> SBA regulations state that the 1500 or fewer employee SBA standard identified by Standard Industrial Classification codes applies for purposes of the RFA. 13 C.F.R. §121.902

<sup>15</sup> 5 U.S.C. § 601 (3). Further, the SBA has sole authority to make determinations on size standards pursuant to the Small Business Act. 15 U.S.C. 632 (a) (2).

<sup>16</sup> *In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *Notice of Proposed Rulemaking*, CC Docket No. 96-98 (May 14, 1996) ("Interconnection Docket"). In its Regulatory Flexibility Analysis, the FCC declared that the Regulatory Flexibility Act of 1980 does not apply and "[i]ncumbent LECs directly subject to the proposed rule amendments do not qualify as small businesses since they are dominant in their field of operation." *Id.* paras 275-77.

<sup>17</sup> See Reply Comments of the Rural Telephone Coalition filed May 30, 1996 in the Interconnection Docket and Comments of NTCA filed August 15, 1996 in Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Licensees, WT

RTC's comments in its FRFA attached to the order implementing the interconnection rules, it did so summarily. It presented a meager justification for its actions, merely stating it has made the "dominance" declaration since the 1980's.<sup>18</sup> The Commission decided to include small incumbent LECs in the interconnection FRFA anyway, possibly to shield itself from review for Regulatory Flexibility Act purposes. Notwithstanding, it refused to address its invariable determination that incumbent LECs are dominant.<sup>19</sup>

The "dominance in its field of operation" mantra comes from Part 13, section 121 of the Code of Federal Regulations. The Commission apparently believes the "field" in the "field of operation" is the incumbent local exchange carrier's local service area and it concluded in 1986 of course, that rural LECs were dominant in that field.<sup>20</sup> However, the SBA's regulations clearly indicate that the "field of operation" is meant to be either the

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Docket No. 96-148.

<sup>18</sup> *In re* Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, *First Report and Order*, CC Docket No. 96-98 (released August 8, 1996). "We have found incumbent LECs to be 'dominant in their field of operation' since the early 1980's and we consistently have certified under the RFA that incumbent LECs are not subject to regulatory flexibility analyses because they are not small businesses." *Id.* para 1330.

<sup>19</sup> *Id.*

<sup>20</sup> In 1986, the Commission first concluded that the Regulatory Flexibility Act did not apply to incumbent LECs, no matter how small. At that time, it reasoned that every incumbent LEC, regardless of size, was not a "small entity" under Section 3 of the Small Business Act because that section excluded any business that is dominant in its field of operation. Regulation of Small Telephone Companies, *Notice of Proposed Rulemaking*, 51 Fed. Reg. 45912 (proposed December 23, 1986). In a Report and Order released in 1987, the Commission simply affirmed its 1986 conclusion with the cursory statement, "[n]o argument has been advanced that would cause us to modify that determination." Regulation of Small Telephone Companies, *Report and Order*, 2 FCC Rcd 3811, 3815 (1987).

industry in which the company operates or a standard that examines the small business in a nationwide context. Factors such as "start up costs," "historical activity within an industry" and "unique factors occurring in the industry which may distinguish small firms from large firms" are included in the list of considerations the SBA can make in establishing size standards.<sup>21</sup> The SBA can also look at the characteristics "which may allow a concern to exercise a major controlling influence on a national basis in which a number of business concerns are engaged."<sup>22</sup> Either from a nationwide or industry-wide basis, rural local exchange carriers like NTCA's members do not exercise major controlling influence and are not dominant.

Every time the Commission declares a rural LEC dominant or excludes it from regulatory flexibility analysis in a proceeding, it is usurping the SBA's authority to determine what businesses are subject to protection and making a size determination. The Commission has been operating on a premise that automatically assumes the dominance of rural LECs and thus these companies have been disregarded in the regulatory flexibility analyses of past proceedings. As a result it has failed to make the necessary analysis which if made, would cause it to consider adverse impacts on small ILECs, including market entry barriers, each time it begins a proceeding to adopt regulations that affect these small entities. The Commission should adopt the SBA's size definition of 1500 employees or less and apply that definition to rural incumbent LECs for purposes of the Regulatory Flexibility Act. Likewise, working under the assumption that the great

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<sup>21</sup> 13 C.F.R. § 121.102.

<sup>22</sup> *Id.*

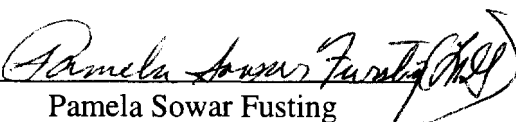
majority of rural incumbent LECs are "small entities," it ought to complete a regulatory flexibility check upon the initiation of every new proceeding.

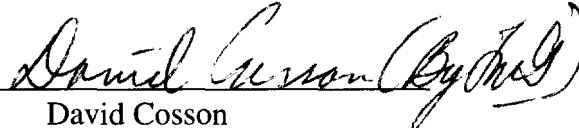
## VI. CONCLUSION

Small, rural telephone companies continue to face certain market entry barriers and regulatory burdens. Results of the PCS C-block auctions indicate that under the current rules, small and rural telephone companies face substantial barriers to obtaining licenses in their service areas. The Commission should act to encourage growth of small, rural companies by addressing the aforementioned regulatory burdens: large study area waiver filing fees; unnecessary restrictions on companies seeking average schedule settlement status; lengthy and unnecessary approval procedures for requests to change LATA associations; and, the practice of excluding small LECs from regulatory flexibility checks due to their so-called "dominant" status.

Respectfully submitted,

National Telephone Cooperative Association

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## APPENDIX A

### NTCA MEMBERS THAT PARTICIPATED IN THE C-BLOCK PCS AUCTIONS

<u>State</u>	<u>Member Average 1995 Revenues</u>	<u>Member Average Number of Employees</u>	<u>Member Average Population Density/Mile</u>	<u>Member Average Number of Subscribers</u>	<u>Percent of Members who participated in C-Block auctions</u>	<u>Members' Average Percentage Equity in a Bidding Entity</u>	<u>No. of C-block Licenses Won by the Bidding Entities</u>
Alabama	\$3,636,132	26	7.86	3,158	44.44	34.55	2
Alaska	\$8,748,604	66	21.03	5,998	11.11	100.00	None
Arizona	\$3,342,613	20	3.53	2,741	20.00	100.00	None
Arkansas	\$4,184,926	19	4.99	3,954	None	None	None
California	\$20,227,442	60	5.82	7,557	None	None	None
Colorado	\$1,178,952	8	1.88	1,187	None	None	None
Connecticut	\$12,592,857	70	N/A	N/A	None	None	None
Florida	\$6,273,483	43	3.38	7,169	100.00	6.67	3
Georgia	\$5,088,460	28	7.64	5,380	23.08	28.03	7
Idaho	\$2,205,050	14	3.19	2,155	25.00	50.00	None
Illinois	\$2,187,193	14	8.84	1,937	None	None	None
Indiana	\$3,316,227	21	8.82	4,218	6.67	19.23	3
Iowa	\$1,228,729	7	6.75	1,406	4.08	7.07	None
Kansas	\$4,360,326	21	3.03	3,703	14.29	83.09	3
Kentucky	\$5,900,126	40	7.56	11,117	None	None	None
Louisiana	\$10,207,461	55	8.44	8,948	50.00	18.06	5

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Maine	\$3,797,012	24	29.13	4,557	16.67	50.00	None
Massachusetts*	\$803,191	6	23.00	957	None	None	None
Michigan	\$1,772,047	10	10.58	1,484	46.15	20.54	10
Minnesota	\$2,830,142	17	4.37	3,730	26.09	22.58	5
Mississippi	\$2,171,069	12	6.66	2,903	None	None	None
Missouri	\$4,582,858	23	4.22	5,550	None	None	None
Montana	\$6,835,183	39	5.59	6,037	15.38	100.00	None
Nebraska	\$2,734,542	21	2.31	2,637	4.55	100.00	None
Nevada	\$1,817,647	8	12.94	2,991	50.00	100.00	None
New Hampshire	\$5,132,928	48	28.00	4,768	25.00	81.67	None
New Mexico	\$7,403,319	54	1.41	3,225	16.67	100.00	None
New York	\$4,491,509	29	13.56	5,453	44.44	34.28	None
North Carolina	\$6,896,950	48	10.22	11,881	None	None	None
North Dakota	\$5,517,267	37	1.91	6,172	None	None	None
Ohio	\$1,524,113	8	10.43	2,107	9.09	33.33	None
Oklahoma	\$8,908,800	69	9.39	9,218	15.38	< 1%	17

## APPENDIX A

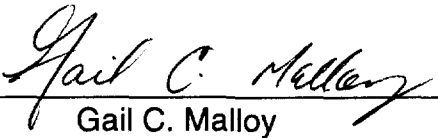
### NTCA MEMBERS THAT PARTICIPATED IN THE C-BLOCK PCS AUCTIONS

<u>State</u>	<u>Member Average 1995 Revenues</u>	<u>Member Average Number of Employees</u>	<u>Member Average Population Density/Mile</u>	<u>Member Average Number of Subscribers</u>	<u>Percent of Members who participated in C-Block auctions</u>	<u>Members' Average Percentage Equity in a Bidding Entity</u>	<u>No. of C-block Licenses Won by the Bidding Entities</u>
Oregon	\$3,226,312	19	11.02	4,177	53.85	32.32	None
Pennsylvania	\$2,451,120	12	8.15	2,642	None	None	None
South Carolina	\$15,228,283	94	12.03	21,955	10.00	49.00	1
South Dakota	\$3,631,591	20	2.37	3,785	26.67	53.33	None
Tennessee	\$10,706,046	72	7.86	16,530	14.29	33.33	None
Texas	\$5,852,923	37	4.15	3,865	13.16	52.61	10
Utah	\$3,570,447	23	2.49	3,158	20.00	100.00	None
Vermont	\$7,086,138	26	15.98	8,511	33.33	100.00	None
Virginia	\$1,933,781	19	7.13	2,336	57.14	0.27	2
Washington	\$3,800,000	70	N/A	3,400	100.00	39.20	None
Wisconsin	\$1,755,295	12	4.30	1,953	None	None	None
West Virginia	\$2,298,168	14	6.05	3,390	33.33	1.00	2
Wyoming	\$5,948,900	20	3.50	5,814	25.00	100.00	1

\* 1994 Annual Revenues, Employees, Density, and Subscribers

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing Comments of the National Telephone Cooperative Association in GN Docket No. 96-113 was served on this 23rd day of August 1996, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached service list:

  
Gail C. Malloy

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